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SUPREME COURT, U. S.

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IN THE

Supreme Court Of The United States

No. 75-69

Norman Wayne Journey,
Petitioner,

VS.

State of Arkansas,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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INDEX

Page

Opinion Below 1

Jurisdiction 2

Question Presented for Review 2

Constitutional Provisions and Statute Involved 2

Statement 3

Reason for Granting the Writ 5

The Court should squarely hold that the Fifth Amendment to the Constitution prohibits both the State and Federal Governments from maintaining successive prosecutions upon the same evidence for an offense growing out of the same transaction 5

Conclusion 7

Appendix 8

Opinion of the Supreme Court of the State of Arkansas 1

LIST OF AUTHORITIES CITED

Cases

Page

Abbate v. U.S., 359 U.S. 187, 196-204 5

Ashe v. Swenson, 397 U.S. 436, 488, 90 S. Ct. 1189, 1197 5

Bartkus v. Illinois, 359 U.S. 121, 150-170 5

Benton v. Maryland, 395 U.S. 784, 89 S. Ct. 2056 5

Green v. U.S., 355 U.S. 184, 187, 78 S. Ct. 221 6

Moseley v. U.S., 4 F. 2d 381 6

Others

Page

Fifth Amendment, United States Constitution 5

18-U.S.C.S., Sec. 2314 3

Ark. Stat. Ann. §41-3938 (Repl. 1964) 2

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Norman Wayne Journey, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Arkansas entered in the above-entitled case on April 14, 1975.

OPINION BELOW

The opinion of the Supreme Court of Arkansas is reported at 257 Ark. 1007; 521 S.W.2d 210 (1975), and is printed in Appendix "A" hereto, infra , page A-1.

JURISDICTION

The judgment of the Supreme Court of Arkansas (Appendix A, infra, page A-1) was entered on April 14, 1975. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

QUESTION PRESENTED

Whether the Fifth Amendment to the Constitution of the United States prohibits both State and Federal prosecutors from maintaining successive prosecutions upon the same evidence for an offense growing out of the same transaction; and where in prosecuting the Federal offense, every essential element of the State offense is established.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment, United States Constitution.

2. 18-U.S.C.S., Sec. 2314

3. Ark. Stat. Ann. §41-3938 (Repl. 1964)

> "Any person who shall possess stolen goods, money or chattels which exceed the aggregate value of thirty-five dollars ($35.00), knowing them to be stolen, with intent to deprive the true owner thereof, shall be guilty of a felony, and upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than one (1) year nor more than twenty-one (21) years; and if the aggregate value thereof be not more than

thirty-five ($35.00) dollars, such person shall be guilty of a misdemeanor and shall be punished by imprisonment in the county prison or municipal or city jail not more than one (1) year and shall be fined not less than ten dollars ($10.00) nor more than three hundred dollars ($300.00)."

STATEMENT

The petitioner was tried in U.S. District Court of Missouri, Eastern District of Missouri, Eastern Division, Case No. 73 CR 9 (3), for the offense of transporting stolen property (jewelry) from St. Louis, Missouri, to Little Rock, Arkansas, (T. 11), in violation of 18 U.S.C.A., Sec. 2314. His trial resulted in a jury verdict of "Not Guilty" and a judgment of acquittal was entered on June 7, 1973 (T. 39). On August 3, 1973, charges were instituted against petitioner in the Circuit Court of Pulaski County, Arkansas, Case No. 76-933, charging the petitioner with the offense of possession of the stolen jewelry in Pulaski County, Arkansas (T. 1).

Petitioner filed on November 7, 1973 a motion to dismiss state charges because of former acquittal (T. 8-10).

On June 3, 1974 the Circuit Court of Pulaski County, Arkansas denied petitioner's motion to dismiss because of former acquittal (T. 51).

On April 14, 1975 the Arkansas Supreme Court affirmed the judgment of Trial Court (App. "A").

Petitioner's arrest and prosecution in U.S. District Court for the Eastern District of Missouri was the product of a joint and cooperative investigation by the Federal and

State authorities. During the course of the petitioner's trial on the federal charges of asportation, there was no real contention by the government that petitioner had, in fact, transported the stolen jewelry to Little Rock, Arkansas. The bulk of the prosecution's case pertained to petitioner's activities in Little Rock in helping to dispose of the stolen jewelry. The petitioner admitted participating in the sale and a brief possession of the jewelry, but denied guilty knowledge as to the property being stolen. The Federal Government's case as to asportation was purely circumstantial, the government's relying upon "proof of possession of recently stolen goods" as giving rise to the inference or presumption of transportation.

After petitioner's acquittal on Federal charges of violating 18 U.S.C.A., Sec. 2314, charges were instituted against him anew in the Arkansas State Court for the alleged possession of the stolen property. The State's "possession" charge is in reality the same identical "possession" as relied upon by the Federal Government in order to maintain its prosecution. The petitioner has already been placed in jeopardy on the issue of possession with criminal intent or knowledge, and the jury's verdict was tantamount to an implied acquittal of criminal "possession."

At the hearing in the Pulaski Circuit Court at petitioner's motion to dismiss because of former jeopardy, it was stipulated (T. 62-74) that the evidence and the witness relied upon in both prosecutions were substantially the same.

REASONS FOR GRANTING THE WRIT

The Court should squarely hold that the Fifth Amendment to the Constitution prohibits both the State and Federal Governments from maintaining successive prosecutions upon the same evidence for an offense growing out of the same transaction. It should reject the archiac theory that the two prosecutions are permissible because they are carried out by separate sovereigns. (See *Bartkus v. Illinois*, 359 U.S. 121, 150-170 (1959) (dissenting opinions); *Abbate v. United States*, 359 U.S. 187, 196-204 (1959) dissenting opinions).

It is well settled that the Fifth Amendment guarantee against double jeopardy is enforceable against the States through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed 2d 707.

This Court recognized in *Ashe v. Swenson*, 397 U.S. 436, 488, 90 S. Ct. 1189, 1197, 25 L. Ed 2d 469, 478 (1970), that the double jeopardy clause incorporates the doctrine of collateral estoppel as a Constitutional requirement. In the concurring opinion of Mr. Justice Brennan, the Court said that the double jeopardy clause requires the prosecution "to join at one trial all of the charges against the defendant which grow out of a single criminal act, episode, occurrence or transaction."

The Arkansas Supreme Court refused to recognize the "same transaction test" or "same evidence rule" in deciding the case contrary to the decisions of this court. It reasoned that had the appellant been convicted rather than acquitted under Federal indictment, he could have more appropriately asserted the claim of double jeopardy.

This Court said in *Green v. United States*, 355 U.S. 184, 187, 78 S. Ct. 221, 2 L. Ed 2d 199 (1957), that the double jeopardy clause is:

> "that the State with all its resources and power (shall) not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . . "

The petitioner should not be required to run the gauntlet a second time on the issue of criminal possession. Obviously, the crime of "transporting" would of necessity embrace "possession."

> "Where the possession of liquor charged in an indictment was the possession incident to its unlawful transportation, charged as a separate offense in another count, there cannot be a conviction on both counts." *Moseley v. U.S.*, 4 F. 2d 381 (1925).

The rational of duel prosecutions carried out by separate sovereigns for the same or similar offense growing out of the same transaction can no longer be reconciled with the principles announced in *Ashe v. Swenson*, supra, and *Benton v. Maryland*, supra.

CONCLUSION

This Court should clearly and firmly enunciate guidelines prohibiting State and Federal prosecutors from mounting successive prosecutions upon the same evidence for the various offenses, which they might be able to carve out of the same criminal act or transaction. The protection afforded under the double jeopardy clause of the Fifth Amendment should not be diluted under the guise of separate sovereigns. This petition for Writ of Certiorari should therefore be granted.

Respectfully submitted,

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APPENDIX "A"
SUPREME COURT OF ARKANSAS

No. CR 74-169
Opinion Delivered Apr. 14, 1975

Norman Wayne Journey,

V. Appellant Appeal from Pulaski Circuit Court, First Division

State of Arkansas, Appellee William J. Kirby, Judge

AFFIRMED

J. FRED JONES, Associate Justice

Some jewelry was taken in an armed robbery in St. Louis, Missouri, and was later found and recovered in Little Rock, Arkansas. Norman Wayne Journey was charged on information filed by the prosecuting attorney in Arkansas with the crime of possessing stolen property (the jewelry) of a value in excess of $35.00 knowing the same to have been stolen. (Ark. Stat. Ann. §41-3938 [Repl. 1964]). Journey filed a motion to dismiss the information because of prior acquittal and the motion was denied by the trial court. On appeal to this court Journey contends that the trial court erred in denying his motion to dismiss.

Journey's motion was predicated upon the fact that he had been tried and acquitted in a United States District Court in Missouri under a federal grand jury indictment for the crime of transporting the stolen merchandise in interstate commerce. (18 U.S.C.A. §2314). The district

court, in the federal case, set out the specific charge against Journey, and the elements necessary to prove the charge, in its instructions to the jury as follows:

> "The indictment is based upon a statute which is Federal law which reads as follows:
>
> 'Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or . . .'
>
> shall be punished according to law.
>
> Three essential elements are required to be proved in order to establish the offense charged in the indictment:
>
> First: The act or acts of transporting, or causing to be transported, in interstate commerce stolen jewelry as charged;
>
> Second: Doing such act or acts willfully and with knowledge that the property had been stolen;
>
> Third: The value of the stolen property so transported or caused to be transported must exceed $5,000.00.'

The district court emphasized in its instructions to the jury that in order to convict, it would be necessary for the government to prove beyond a reasonable doubt, that the property had a value in excess of $5,000. The district court also instructed the jury as follows:

> "Bear in mind that possession alone is not an offense, and that defendant is not charged with illegal

possession. This instruction is given only to aid your understanding of the next following instruction.

Possession of property recently stolen, if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find, in the light of surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen.

And possession in one State of property recently stolen in another State, if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find, in the light of surrounding circumstances shown by the evidence in the case, that the person in possession not only knew it to be stolen property, but also transported it, or caused it to be transported, in interstate commerce."

The court also gave instruction as follows:

"If you should find beyond a reasonable doubt from the evidence in the case that the jewelry described in the indictment was stolen, and was transported in interstate commerce as charged, and that, while recently stolen, the property was in the possession of the accused in another State than that in which it was stolen, you may, from those facts draw the inference that the jewelry was transported, or caused to be transported, in interstate commerce by the accused, with knowledge that it was stolen, unless possession of the recently-stolen property by the accused in such other State is explained to the satisfaction of the jury by other facts and circumstances in evidence in the case."

At Journey's trial in the United States District Court in Missouri, a Mr. Pettry and a Mr. Emory were identified

as the robbers. There was evidence submitted pertaining to Journey's activities in helping to dispose of the jewelry by sale in Little Rock and the ultimate recovery of the stolen jewelry in Little Rock. The evidence pertaining to the transportation of the jewelry from St. Louis to Little Rock was entirely circumstantial and actually proved only that Journey, Pettry, Emory, and the jewelry, all appeared in Little Rock at approximately the same time. As already stated, the federal district court jury found him not guilty.

The statute on possession of stolen property for which information was filed against Journey in Arkansas is Ark. Stat. Ann. §41-3938 (Repl. 1964) and reads as follows:

> "Any person who shall possess stolen goods, money or chattels which exceed the aggregate value of thirty-five dollars ($35.00), knowing them to be stolen, with intent to deprive the true owner thereof, shall be guilty of a felony, and upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than one (1) year nor more than twenty one (21) years; and if the aggregate value thereof be not more than thirty five ($35.00) dollars, such person shall be guilty of a misdemeanor and shall be punished by imprisonment in the county prison or municipal or city jail not more than one [1] year and shall be fined not less than ten dollars ($10.00) nor more than three hundred dollars ($300.00)."

The statutes under which the appellant contends he is immune to prosecution in this case are §§43-1224.1—43-1224.2 (Supp. 1973) which read as follows:

> "43-1224.1. When a person has been either acquitted or convicted, on the merits, of an offense

against the United States or against another state or territory thereof, the acquittal or conviction is a bar to prosecution for an offense against this State, or any governmental subdivision thereof, when the two [2] offenses were committed in the same course of conduct and are of the same character.

43-1224.2. For purposes of this act [§§43-1224.1—43-1224.4 two [2] offenses are of the same character when the elements which must be proved to obtain a conviction of one offense are not substantially different from the elements which must be proved to obtain a conviction of the other. In determining whether such elements are not substantially different, the court shall compare the respective purposes of the laws defining the two [2] offenses, as such purposes relate to the particular course of conduct of the defendfant.

(a) Differences attributable solely to the fact that the defendant's conduct affected, in the same manner, the person or property of two [2] or more individuals, and

(b) Differences consisting of elements necessary merely to establish subject matter jurisdiction, shall not be considered in deciding whether the two [2] offenses are of the same character."

We are of the opinion, and so hold in this case, that the crime for which Journey was charged in Arkansas and the one for which he was tried and acquitted in the United States District Court of Missouri, were not offenses of the same character within the meaning of the above sections of the statutes. In the United States District Court Mr. Journey was charged, tried and acquitted of transporting or causing to be transported, stolen jewelry valued in excess of $5,000 across a state line in violation of federal law. Under the state information involved on this appeal

he was simply charged with possession of the stolen property. He was charged with transportation in one case and possession in the other, of course, scienter was an element in both cases.

Sections 43-1224.1 and 43-1224.2, *supra*, are so loosely drawn they invite the argument in any case of acquittal or conviction in one state or in federal court that such acquittal or conviction would preclude the prosecution for any *related* offense or offenses involving the same subject matter in this state. We are unable to read such broad application into the statutory provisions. If such effect were to be given §§ 43-1224.1 and 43-1224.2 of the Arkansas statutes, there is no end to the extent the statute could be applied. A conviction or acquittal in federal court for transporting a female across a state line for purposes of prostitution would preclude prosecution under state law for engaging in prostitution on either side of the state line. As to the federal court trial in the case at bar, it was necessary to not only prove that Journey transported the jewelry across the state line under the charge for which he was tried in federal court, but it was necessary to prove that the jewelry so transported was worth $5,000.

No one questions the constitutional right of an accused to not twice be placed in jeopardy or given double punishment for the same offense, but we simply do not view the case at bar as that kind of case. The appellant cites, and relies heavily on, 22 C.J.S. §285 where the "same transaction test" is discussed as it applies to double jeopardy. In this same section of C.J.S. we find the following language:

> "[T]here are many adjudications to the effect that, if two offenses grow out of the same transaction, and such offenses are severable and distinct and one is not included in the other, a prosecution for one will not bar a prosecution for the other. Thus a single act may be an offense against two statutes, or a single statute and the common law, and if the statute or the common law requires proof of an additional fact which the other does not, an acquittal or a conviction under one does not exempt accused from prosecution and punishment under the other."

We deem it unnecessary to attempt distinguishing all of the cases cited by the appellant, and we deem it unwise to attempt laying down or adopting a "same transaction rule" or any other rule of law, that would control in any case regardless of the circumstances and facts in that case. In the case at bar guilty knowledge, actual transportation across state line and $5,000 in value were all necessary elements of the crime charged in the federal indictment, under which the appellant was tried and acquitted.

Now, had the appellant been convicted rather than acquitted under the federal indictment, perhaps it could have been more logically argued that he also possessed the stolen goods as he transported them in interstate commerce because transportation might logically *include possession*, but certainly a charge of unlawful possession does not include transportation. It would appear, moreover, that one might "cause to be transported" in interstate commerce, stolen goods he had never possessed or even seen. Under the appellant's theory and argument in this case, if the appellant had been acquitted of the federal charge simply on the basis that the value of the stolen jewelry amounted to $4,000 rather than the required $5,000, then the appellant would have been immune to prosecution for the possession of the stolen

property in Arkansas regardless of whether he transported it or did not transport it in interstate commerce.

The judgment is affirmed.

Byrd, J., dissents.